

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

60988

FILE: B-184400

DATE: August 7, 1975

MATTER OF: Society Brand, Incorporated

97295

DIGEST:

1. Protest alleging arbitrary and capricious action on part of contracting officer in restricting procurement wholly to small business without making independent examination of competitive market conditions, filed after bid opening, is untimely under § 20.2(b)(1) of Bid Protest Procedures which requires that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening be filed prior to bid opening. Section 20.2(b)(3) exception to § 20.2(b)(1), concerning protest by mailgram, is inapplicable, as mailgram was not sent by third day prior to final date for filing protest.
2. Fact that information copy of protest to GAO was received by procuring activity prior to bid opening does not convert otherwise untimely direct protest to GAO (protest was not received until after bid opening) under Bid Protest Procedures, since information copy, was not protest to procuring activity such as to make that portion of procedures dealing with initial protests to agencies applicable.

This is a protest filed by counsel on behalf of Society Brand, Incorporated (SBI), involving invitation for bids (IFB) No. DSA100-75-B-1115, issued by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania. SBI contends " * * * that the contracting officer acted arbitrarily and capriciously in restricting the procurement only to small business and did not make an independent examination of competitive market conditions."

The record indicates that bids submitted in response to the IFB were opened on July 3, 1975. SBI's mailgram protest to our Office, although dated July 1, 1975, was not received by our Office until July 7, 1975. Section 20.2(b)(1) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), provides, in pertinent part, that "Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening * * * shall be filed prior to bid opening * * *." Under this section, SBI's protest was untimely filed.

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Section 20.2(b)(3), which sets forth an exception to § 20.2(b)(1) in the case of a protest by mailgram states, in pertinent part, that, " * * * any protest received in the General Accounting Office after the time limits prescribed in this section shall not be considered unless it was sent by * * * mailgram not later than the third day, prior to the final date for filing a protest as specified herein." In the instant matter, the final date for filing a protest was July 3, 1975, making the third day prior to the final date June 30, 1975. As SBI's mailgram was dated July 1, 1975, § 20.2(b)(3) is inapplicable.

Accordingly, SBI's protest is untimely and will not be considered by our Office on its merits. We reach this conclusion cognizant of the fact that SBI did not learn until July 1, 1975, that the bid opening would not be postponed. According to SBI, the firm had previously contacted the contracting officer, among others, requesting that the bid opening be postponed to permit examination by SBI as to the propriety of the total small business set-aside. However, SBI is not now protesting the fact that bid opening was not postponed but rather the fact that the procurement was wholly restricted to small business. This issue, as discussed above, had to have been, but clearly was not, protested to our Office prior to bid opening.

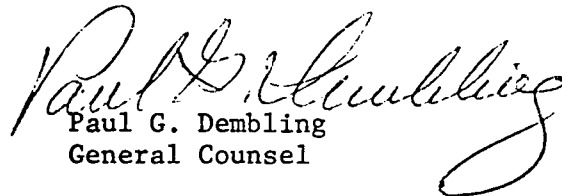
We also are aware of the fact that the contracting officer received a copy of SBI's July 1, 1975, protest to our Office prior to the opening of bids. This does not convert an otherwise untimely direct protest to our Office into a timely protest. The telex message the contracting officer received was only an information copy of the protest sent to our Office (apparently to comply with § 20.1(c) of our procedures), not a protest to DPSC against the alleged improper use of a total small business set-aside or the rejection of SBI's request to postpone the date set for bid opening. As such, that portion of the procedures dealing with initial protests to agencies does not apply.

By letter dated July 11, 1975, counsel supplemented the protest mailgram by setting forth the following six issues of protest concerning this procurement:

1. Total small business set-aside was abuse of administrative discretion.
2. Instant procurement should not have been set aside for small businesses.

3. Inadequate competition existed under a total set-aside.
4. Prices received under a total set-aside were not reasonable.
5. All procurements within Standard Industrial Classification 2352 should not be made a class set-aside for small business participation.
6. Pattern of bidding on this and related procurements by Waldman and two other bidders.

In view of the above conclusion, issues No. 1, 2 and 5, will not be considered. However, issues No. 3 and 4, will be considered only to the extent that they concern the propriety of any proposed award and not to the extent that they question the propriety of the determination to utilize a total small business set-aside for this procurement. Issue No. 6 will be considered in its entirety. These timely issues will be considered by our Office in conjunction with the protest filed by counsel on behalf of Waldman Manufacturing Company, Inc. (Waldman), under the IFB. For administrative purposes, the timely protest issues of SBI and the protest of Waldman will be docketed as B-184400, B-184234.


Paul G. Dembling
General Counsel